



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 1, 2015

J. Christine Dietrick
City Attorney's Office
990 Palm Street
San Luis Obispo 93401-3249

Re: Your Request for Informal Assistance
Our File No. I-15-027

Dear Ms. Dietrick:

This letter responds to your request for advice, on behalf of San Luis Obispo Councilmember Dan Rivoire, regarding Section 1090 and the provisions of the Political Reform Act (the "Act").¹ Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. Because your questions are general in nature and not limited to specific governmental decisions, we are treating your request as one for informal assistance.²

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the San Luis Obispo County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. We are also required to advise you that, for purposes of Section 1090, the advice "is not admissible in a criminal proceeding brought against any individual other than the requestor." (Section 1097.1(c)(5).)

QUESTIONS

1. May the City of San Luis Obispo ("City") continue to lease property to the San Luis Obispo County Bicycle Coalition ("SLOCBC") upon expiration of the current lease and contract with the SLOCBC for bicycle related services?

2. May the City extend or modify its existing contracts with Verdin Marketing Ink Co. ("Verdin") or enter into new contracts with Verdin?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

3. May Mrs. Rivoire work for Verdin on projects under contract with the City if she has not participated in the preparation of any contract proposal?

4. May Councilmember Rivoire participate in decisions before the City if the applicant or contractor is a donor or volunteer for the SLOCBC?

5. Must Councilmember Rivoire report donations, made to the SLOCBC as a result of his fundraising efforts as an SLOCBC employee, as behested payments?

CONCLUSIONS

1. Because Councilmember Rivoire only has a remote interest in the SLOCBC, the City is not prohibited from leasing property to the organization or contracting with the organization to provide bicycle related services. However, Councilmember Rivoire may not participate in any decisions involving the contracts.

2. Because Councilmember Rivoire only has a remote interest in Verdin resulting from his wife's employment, the City is not prohibited from extending or modifying a contract or entering into a new contract with Verdin. However, Councilmember Rivoire may not participate in any decisions involving the contracts.

3. Neither Section 1090 nor the Act precludes Mrs. Rivoire from working for Verdin on projects under contract with the City if she has not participated in the preparation of any contract proposal.

4. Generally, the mere fact that an applicant or contractor has previously donated or volunteered for the SLOCBC does not give rise to a reasonably foreseeable effect on either Councilmember Rivoire's interest in the SLOCBC as a source of income or his personal finances. However, we are unable to determine whether Councilmember Rivoire may be disqualified from any particular decision without a complete description of the facts known at the time of the decision.

5. All payments made to the SLOCBC at Councilmember Rivoire's behest aggregating to \$5,000 from the same source must be reported as behested payments. (Commission Form 803.)

FACTS

San Luis Obispo Councilmember Rivoire took office on December 2, 2014. He is also the Executive Director of the SLOCBC, a 501(c)(3) nonprofit corporation. Councilmember Rivoire receives income from the SLOCBC and his duties with the SLOCBC include negotiating contracts as well as fundraising and soliciting donations and contributions of monetary and volunteer support for the SLOCBC. Councilmember Rivoire's compensation from the SLOCBC is set by a volunteer Board of Directors and is indirectly impacted by the level of his fundraising efforts as the Board of

Directors adjusts his compensation based on an annual review of the overall success of the organization, including its fiscal health tied, in part, to fundraising.

SLOCBC Contract:

Under a commercial lease first executed January 19, 2010, the City leases approximately 720 square feet of commercial space to the SLOCBC. The initial term of the lease was for February 15, 2010, to January 31, 2013. The SLOCBC exercised a 3-year option to extend at the conclusion of the initial term. Under the lease, the SLOCBC receives a reduced rental rate for providing the City with certain bicycle-related services. For example, the fair rental rate for the property in 2013 was \$1.75 per square foot and the reduced rental rate was \$1.11 per square foot. Services the SLOCBC provide for the City include bike locker management, marketing campaign services, a bike parking ordinance awareness campaign, development of a bike rack request system, and bike counting services.

It is anticipated that the City will continue leasing the property to the SLOCBC at a reduced rent in exchange for similar bicycle-related services. It is also anticipated that the SLOCBC Board will pursue a request to the City for a further rent reduction through the City's 2015-17 budget/financial plan process, which is currently underway. Budget adoption is scheduled in June 2015. The City expects the SLOCBC to request a reduced rent of \$1 per year, as the City does with several other local non-profits that rent City properties. The City does not currently know whether there will be any proposal to provide additional services in exchange for the requested rent reduction.

Verdin Contracts:

Councilmember Rivoire's wife, Megan Rivoire, works for a local marketing firm, Verdin, as its Creative Strategist and Photographer, a non-management position. Verdin has fifteen employees. Mrs. Rivoire has been in her position since September 2011, owns no shares of stock in the company, and is not an officer or director. Mrs. Rivoire will not participate in formulating any bids or proposals for the City. Moreover, Mrs. Rivoire anticipates that she will be transitioning her employment relationship with Verdin over the next few months from that of a full-time regular employee to that of a part-time contract employee. Following the transition, Mrs. Rivoire anticipates that she will work for Verdin primarily as a project photographer, contributing other creative expertise as needed. Mrs. Rivoire anticipates that Verdin will pay her hourly on a project basis. At this time, it is not possible to project precisely what Mrs. Rivoire's income from this employment will be.

The City currently has four separate contracts with Verdin. Three of the contracts are directly between the City and Verdin and the fourth lists Verdin as a marketing and public outreach subcontractor for a large public works project. These contracts include:

- Approximately \$46,000 per fiscal year for the Utilities Department's Community Information and Outreach Services program. The contract is for three years and expires in 2017 with a one-year option to extend.
- Approximately \$33,000 through the City's Promotional Coordinating Committee for event promotional services. This contract expired in December 2014 and City staff is in the process of negotiating a new contract with Verdin for 2015 for similar marketing services.
- Approximately \$20,000 for the Police Department's Crime Prevention and Community Outreach Services program. This contract terminates upon completion of the scope of work.
- Verdin is listed as a subcontractor for MNS Engineering, which is the project management consulting firm for the City's Los Osos Valley Road interchange project.

The City anticipates that it may either extend or modify the above contracts and that Verdin will submit proposals in the future to enter into additional contracts for similar services as project needs arise and the City solicits proposals per its normal processes.

Donors to SLOCB:

The City anticipates that donors to the SLOCBC will be seeking land use approvals, permits or entitlements from the City. It is also likely that donors will seek contracts to provide services to the City.

ANALYSIS

1. May the City continue to lease property to the SLOCBC upon expiration of the current lease and contract with the SLOCBC for bicycle-related services?

Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

In this instance, it is not contested that Councilmember Rivoire is a public officer subject to Section 1090, that contracts with SLOCB constitutes contracts for purposes of Section 1090, and that Councilmember Rivoire is presumed to be involved in the making of all contracts by the City Council. The determinative question is whether the councilmember has a financial interest in the contract that precludes the City from continuing to lease property to SLOCB and contract with SLOCB for bicycle-related services.

For purposes of Section 1090, officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig, supra*, at p. 333.) In this case, it appears that Councilmember Rivoire has a financial interest in any contract with the SLOCB as his employer and the fact that his compensation is based upon the overall health of the entity. However, there are various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5. As pertinent to Councilmember Rivoire's circumstances, an officer or employee of a 501(c)(3) nonprofit entity, such as SLOCB, has only a remote interest in the contracts, purchases, and sales of that nonprofit entity.

Because Councilmember Rivoire only has a remote interest in the SLOCB, the City is not prohibited from leasing property to the organization or contracting with the organization to provide bicycle-related services. However, Councilmember Rivoire may not participate in any decisions regarding the contracts. Under Section 1090, a contract can be made if an official has only a "remote interest" in the contract so long as (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).)³

2. May the City extend or modify its existing contracts with Verdin or enter into new contracts with Verdin?

Like the SLOCB contract, the determinative question is whether Councilmember Rivoire has a financial interest in contracts with Verdin. While officials generally have financial interests in the contracts of their spouses' employers for purposes of Section 1090 (See *Kellner* Advice Letter, No. A-15-021), as pertinent to Mrs. Rivoire's employment with Verdin, Section 1091(b)(2) states that an employee of a private contracting party has a remote interest when all of the following factors are present:

- The contracting party has 10 or more employees.

³ The board member is not subject to the Act's conflict of interest provisions so long as the board member recuses himself from the agency's decisions. In light of the conclusion that the board member must recuse himself from participating in the decision under Section 1090, further advice under the Act is not necessary. However, the Act does set forth specific procedures for city council members to properly recuse themselves from a governmental decision, which must also be followed. (Section 87105; Regulation 18704.5.)

- The employee has been an employee or agent of that party for at least 3 years prior to the official's term in office.
- The employee owns less than 3 percent of the shares of stock of the contracting party.
- The employee is not an officer or director of the contracting party.
- The employee did not directly participate in formulating the bid of the contracting party.

In regard to Mrs. Rivoire's employment with Verdin, the facts provided indicate that all of these factors are present. Accordingly, Councilmember Rivoire's interest in Verdin is only a remote interest. So long as Councilmember Rivoire does not participate in the decisions, the City is not prohibited from extending or modifying existing contracts with Verdin or entering into a new contract with Verdin.⁴

3. May Mrs. Rivoire work for Verdin on projects under contract with the City if she has not participated in the preparation of any contract proposal?

While Councilmember Rivoire may not participate in contracts with Verdin as addressed above, neither Section 1090 nor the Act precludes Mrs. Rivoire from working for Verdin on projects under contract with the City if she has not participated in the preparation of any contract proposal.

4. May Councilmember Rivoire participate in decisions before the City if the applicant or contractor is a donor or volunteer for the SLOCBC?

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87103.) A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest.

Interests from which a conflict of interest may arise are defined in Section 87103, and those pertinent to the facts provided include:

- Source of Income – A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).)

⁴ Once again, to the extent that Councilmember Rivoire recuses himself from the decisions, it is unnecessary to further consider the Act's conflict of interest provisions.

- Personal Finances – A public official has an economic interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103.)

For Councilmember Rivoire, potential interests include an interest in the SLOCBC as a source of income and his economic interest in his personal finances.⁵ Councilmember Rivoire will need to determine whether the effect on these interests from any particular decision will be reasonably foreseeable and material. Generally, a financial effect is presumed to be reasonably foreseeable if the interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. (Regulation 18701(a).) If the interest is “not explicitly involved” in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. A financial effect need not be likely to be considered reasonably foreseeable. (Regulation 18701(b).) Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. (Regulation 18702.) The materiality standards for any particular interest are provided in Regulations 18702.1 through 18702.5.

Councilmember Rivoire’s interests are not explicitly involved in a decision merely because the decision involves an applicant or contractor that is donor or volunteer for the SLOCBC. Thus, a financial effect is reasonably foreseeable only if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. Generally, the mere fact that an applicant or contractor has previously donated or volunteered for the SLOCBC does not give rise to a reasonably foreseeable effect on either Councilmember Rivoire’s interest in the SLOCBC as a source of income or his personal finances.

Nonetheless, we are unable to determine whether Councilmember Rivoire may be disqualified from any particular decision without a complete description of the facts known at the time of the decision. In some circumstances, additional facts may establish a reasonably foreseeable effect. For example, if Councilmember Rivoire has solicited a donation while the potential donor’s application or contract is pending before the City, the financial effect on the official’s interest is much more likely and therefore reasonably foreseeable. Similarly, a financial effect on his interest is reasonably foreseeable if an applicant or contractor has implied in any way that the decision may influence a donation to the SLOCBC. (See *House Advice Letter*, No. I-13-016.)⁶

5. Must Councilmember Rivoire report donations, made to the SLOCBC as a result of his fundraising efforts as an SLOCBC employee, as behested payments?

⁵ Generally, Councilmember Rivoire does not have an economic interest in a donor to the SLOCBC merely because he has solicited a donation from the donor. (See *Hobrecht Advice Letter*, No. A-12-030, and *Fazio Advice Letter*, No. A-93-442.

⁶ To the extent that Councilmember Rivoire solicits a donation while the potential donor’s contract is pending before the City or a contractor has implied in any way that a decision regarding a contract may influence a donation to the SLOCBC, Section 1090 may also apply.

Section 82015 of the Act requires elected officers to report payments made at their behest that would not otherwise be reported as contributions and are not made principally for a personal purpose providing the following in subdivision (b):

“(2) A payment made at the behest of a candidate is a contribution to the candidate unless the criteria in either subparagraph (A) or (B) are satisfied:

“(A) Full and adequate consideration is received from the candidate.

“(B) It is clear from the surrounding circumstances that the payment was made for purposes unrelated to his or her candidacy for elective office. The following types of payments are presumed to be for purposes unrelated to a candidate’s candidacy for elective office:

“(i) A payment made principally for personal purposes, in which case it may be considered a gift under the provisions of Section 82028. Payments that are otherwise subject to the limits of Section 86203 are presumed to be principally for personal purposes.

“(ii) A payment made by a state, local, or federal governmental agency or by a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

“(iii) A payment not covered by clause (i), made principally for legislative, governmental, or charitable purposes, in which case it is neither a gift nor a contribution. However, payments of this type that are made at the behest of a candidate who is an elected officer shall be reported within 30 days following the date on which the payment or payments equal or exceed five thousand dollars (\$5,000) in the aggregate from the same source in the same calendar year in which they are made. ...”

Under the express terms of Section 82015(b)(2)(B)(iii), all payments made to the SLOCBC at Councilmember Rivoire’s behest aggregating to \$5,000 from the same source in a calendar year must be reported as behested payments. (Commission Form 803.) As provided in Regulation 18215.3(a), for purposes of behested payment reporting, a payment is “made at the behest of an ‘elected officer’ if it is made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent” of the officer. If Councilmember Rivoire needs additional assistance determining whether any particular donation to the SLOCBC was made at his behest, he should seek additional assistance describing his involvement in the solicitation of the donation.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wager
General Counsel

/s/

By: Brian G. Lau
Senior Counsel, Legal Division

BGL:jgl